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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35306

LASSEN VALLEY RAILWAY LLC—ACQUISITION AND OPERATION EXEMPTION—UNION PACIFIC RAILROAD COMPANY

Docket No. FD 35307

KERN W. SCHUMACHER—CONTINUANCE IN CONTROL EXEMPTION—LASSEN VALLEY RAILWAY LLC

Digest: The Board denies the Nevada Central Railroad's request to reverse the Board's earlier authorization for Lassen Valley Railway to acquire from the Union Pacific Railroad and operate 22.34 miles of rail line between Flanigan, California and Wendel, Nevada.[1]

Decided: November 22, 2010

The Board served and published a notice of exemption in Lassen Valley Railway—Acquisition & Operation Exemption—Union Pacific Railroad, FD 35306 (STB served Dec. 3, 2009), for Lassen Valley Railway LLC (LVR) to acquire and operate approximately 22.34 miles of rail line (the Line)[2] from Union Pacific Railroad Company (UP). The Board simultaneously served and published a notice of exemption in Kern W. Schumacher—Continuance in Control Exemption—Lassen Valley Railway, FD 35307 (STB served Dec. 3, 2009), for Kern W. Schumacher (Schumacher) to continue in control of LVR once it became a Class III rail carrier. Both notices were published in the Federal Register at 74 Fed. Reg. 63,501 on December 3, 2009 and became effective on December 17, 2009. This decision denies a petition to reject or revoke the notice of exemption in FD 35306 and addresses other issues raised in both proceedings.

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[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement of Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

[2] The Line consists of (1) the Flanigan Industrial Lead, extending 21.77 miles between milepost 338.33 near Flanigan, Nev., and milepost 360.10 near Wendel, Cal.; and (2) the Susanville Industrial Lead, extending 0.57 miles between milepost 358.68 and milepost 359.25, near Wendel.

BACKGROUND

In 2007, the Board, under 49 U.S.C. § 10502, exempted from the prior approval requirements of 49 U.S.C. § 10903 the abandonment of the Line by UP in Union Pacific Railroad—Abandonment Exemption—in Lassen County, California & Washoe County, Nevada, AB 33 (Sub-No. 230X) (STB served Jan. 26, 2007). On September 15, 2008, Robert Alan Kemp d/b/a Nevada Central Railroad (NCR) (collectively, Kemp) filed an offer of financial assistance (OFA) to purchase a 220-foot segment of the Line beginning at milepost 338.33.[3] The Board, in a decision served on September 19, 2008, rejected the OFA, concluding that it was unlikely to result in continued rail service and that Kemp had failed to demonstrate that he would be able to finance the purchase of the segment and operations over it for at least 2 years, as required by 49 U.S.C. § 10904(f)(4)(A). Kemp filed an administrative appeal, which the Board denied in a decision served on January 27, 2009; he then sought judicial review before the United States Court of Appeals for the Ninth Circuit, which the court denied. Kemp v. STB, No. 09-70576 2010 WL 2782853 (9th Cir. July 13, 2010).

On December 17, 2009, Kemp filed a petition to reject or revoke LVR's notice of exemption and a motion for oral argument and for leave to supplement the record. LVR filed a reply to, and requested that we reject or strike, the petition on December 22, 2009. On December 30, 2009, Kemp filed a motion for a 5-day extension of time to supplement the record. On January 5, 2010, Kemp filed a supplement to the petition to reject or revoke, which contained the verification statement missing from his previously filed petition to reject or revoke and a copy of a Complaint in Condemnation of Real Property (Condemnation Action) that apparently was filed in the Superior Court of California for Lassen County on January 4, 2010.[4] LVR filed a reply on January 6, 2010.

In the interest of compiling a more complete record in this matter, Kemp's supplement and LVR's reply to it will be accepted into the record. Kemp's request for oral argument, however, will be denied. Except in a small number of proceedings where oral hearing at the Board's discretion appears warranted, we rely on a written record to decide the cases before us. Kemp has not demonstrated that the written record here affords an inadequate opportunity for him to make his case.

[3] The exemption had been scheduled to become effective on February 25, 2007, but 3 timely notices of intent to file OFAs to acquire the Line or a portion of the Line were filed, including one by NCR. In a decision served on September 12, 2008, the Board allowed NCR to substitute Kemp in its place and granted Kemp an extension to September 15, 2008, to file an OFA.

[4] Kemp's petition to reject or revoke, motion for an extension, and supplement were all filed on the letterhead of Aviation Technologies Ltd. (ATL).

PRELIMINARY ISSUES

LVR asks the Board to reject Kemp's petition in FD 35306 on grounds that it fails to comply with Board rules, attests to facts that are inaccurate, and otherwise constitutes abuse of the Board's processes. We will not reject Kemp's petition. While the petition was not initially verified as required by 49 C.F.R. § 1104.5, we are permitting Kemp to rectify that problem by accepting his supplemental filing containing the missing verification. Notwithstanding our acceptance of the supplemental filing, a number of facts in the petition still remain unclear: (1) on whose behalf the petition to reject or revoke was filed: "NCR and its Shareholders"[5] or "Robert Alan Kemp d/b/a Nevada Central Railroad;"[6] (2) whether NCR is a sole proprietorship or a corporation; and (3) what the role of ATL is.[7] Despite the lack of clarity, we find the record before us sufficient to address the merits of Kemp's rejection and revocation requests.

Finally, LVR contends that we should reject or strike Kemp's petition to reject or revoke because it contains inflammatory and unsubstantiated allegations. Because we will deny Kemp's petition on the merits, this request is moot and need not be ruled upon.

DISCUSSION AND CONCLUSIONS

Petition to reject or revoke in FD 35306. Kemp asks that we reject or revoke LVR's notice of exemption. Both requests are without merit and will be denied.

Kemp has failed to show that revocation is warranted. Under 49 U.S.C. § 10502(d), the Board may revoke an exemption when it finds that application of a statutory provision is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101. The party seeking revocation has the burden of showing that the criterion is met. See 49 C.F.R. § 1121.4(f). Petitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and that more detailed scrutiny of the transaction is necessary. See Consol. Rail Corp.—Trackage Rights Exemption—Mo. Pac. R.R.,

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[5] Petition to Reject or Revoke 4.

[6] Id. 7.

[7] As noted, the petition to reject or revoke and other submissions in this proceeding are on ATL letterhead, and Kemp states that the 22-mile line at issue in AB 33 (Sub-No. 230X) "will be permanently sustained for a Minimum Period of 50-Years by revenues generated by Customers for which ATL has already contracted for the provision of Transportation Services constituting Interstate Commerce by Rail . . . ." Petition to Reject or Revoke 3.

The notice of exemption Kemp filed in Nevada Central Railroad—Exemption for Acquisition & Operation of Rail Service—in Elko & White Pine Counties, Nevada, FD 34773 (STB served Nov. 22, 2005), was also on ATL letterhead, and in it NCR designated "Robert Allen Kemp Chief Executive Officer–Aviation Technologies Ltd." as its representative and designated him to receive copies of pleadings. NCR also listed Kemp as one of its 3 directors and ATL as one of its shareholders.

FD 32662 (STB served June 18, 1998). Here, however, Kemp does not even attempt to identify any relevant aspect of the RTP or explain why applying an exempted statutory provision is necessary to carry it out, nor does he articulate any reasonable, specific concerns demonstrating that more detailed scrutiny of the transaction is needed.

Kemp also has failed to show that the notice of exemption should be rejected. Under 49 C.F.R. § 1150.32(c), a notice is void ab initio and may be rejected if it contains false or misleading information. Although Kemp asserts that LVR's notice is false or misleading in several respects, none has merit.

First, Kemp argues that the notice of exemption was false and was designed to be misleading by stating that LVR and UP had negotiated a line sale contract, which would be finalized and then filed with the Board. Contrary, however, to Kemp's assertion that no such contract was ever executed or filed with the Board, sealed and redacted public copies of the executed line sale contract were filed with the Board on December 17, 2009, the same day Kemp filed his petition to reject or revoke in FD 35306. Thus, there is no basis in this record for finding the notice of exemption false and misleading on the ground asserted by Kemp.

Kemp also argues that LVR already knew that NCR was in the process of seeking a condemnation of most of the Line when LVR filed its notice of exemption. Accordingly, Kemp argues that LVR "knowingly ma[de] False Statements" that led the Board to erroneously conclude that LVR "has standing" to acquire the line.[8] We reject this argument. First, when LVR filed its notice of exemption, Kemp had not yet filed his Condemnation Action,[9] and he offers nothing but an unsupported assertion that LVR nevertheless knew about that contemplated action when it filed its notice. Additionally, and more to the point, Kemp seems to be arguing here that his state Condemnation Action somehow deprives LVR of the ability to seek Board authority to acquire the Line. That is incorrect. The Line is an active line of railroad under the Board's jurisdiction.[10] As such, a party seeking to acquire the Line must obtain the Board's

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[8] Petition to Reject or Revoke 5.

[9] Kemp's supplemental filing demonstrates that the Condemnation Action was filed almost 2 months after LVR filed its notice of exemption.

[10] Where a rail carrier seeks to abandon a line of railroad, as UP did with this Line in 2007, the Board's jurisdiction over the line remains until the Board authorizes the abandonment and the carrier executes that authority by consummating the abandonment. See Hayfield N. R.R. v. Chi. & Nw. Transp. Co., 467 U.S. 622, 633-34 (1984) Here, although Kemp's complaint in condemnation refers to the Susanville Industrial Lead as "abandoned," neither the Susanville Industrial Lead nor the rest of the Line has been abandoned. The Board authorized UP to abandon the Line, including the Susanville Industrial Lead, but instead of consummating abandonment, UP chose to sell the Line to LVR. Thus, the Line remains a line of railroad subject to the Board's jurisdiction.

authority to do so,[11] and the Board's jurisdiction in that regard is exclusive.[12] As a result, Kemp cannot invoke state eminent domain law to circumvent our required approval and force the sale, nor can Kemp's Condemnation Action prevent LVR from properly seeking Board authority to acquire the same property.[13]

Additionally, Kemp argues that LVR's statement in the notice of exemption that the 220-foot segment would remain subject to the OFA process if Kemp were to prevail on his appeal of the Board's decision on his OFA, is "Absolutely False, and at best Misleading."[14] We find nothing false or misleading about LVR's statement acknowledging that its acquisition of the Line would be subject to whatever relief 49 U.S.C. § 10904 might provide should Kemp prevail in his appeal in the Ninth Circuit. Kemp also asserts that "ONLY NCR has legal standing" to acquire the 220-foot segment.[15] By this, we assume he means that only NCR is entitled to purchase the Line as a result of its having filed an OFA in AB 33 (Sub-No. 230X). The Board rejected NCR's OFA, however, and that decision became effective prior to the Ninth Circuit's decision denying NCR's appeal. Now that the Ninth Circuit has denied NCR's appeal of the Board's decision, this issue is moot.

There is nothing improper or unlawful, nor is it unusual, for entities to compete to acquire a rail line. An entity need not participate in an OFA process to be able to invoke the class exemption of 49 C.F.R. § 1150.31 to acquire a line. Kemp has failed to cite anything improper in LVR's invocation of the notice of exemption process to acquire the Line after the conclusion of the OFA process, nor has he demonstrated anything false or misleading in LVR's assurance that the 220-foot segment would remain subject to the OFA process if the Board's decision on his OFA were reversed.

Finally, Kemp refers to LVR's statement that "the Lines being acquired are approximately 22.34 route miles long," and asserts that "[t]his statement is absolutely False. LVR knows that the stated length of the Line as reported within [its notice of exemption],

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[11] See 49 U.S.C. §§ 10901(a), 10902(a), 11323(a).

[12] See 49 U.S.C. § 10501(b).

[13] Cf. Feeder Railroad Development Program, 365 I.C.C. 93, 95 (1981) (a state's eminent domain powers may not be invoked "as a vehicle to circumvent a federally mandated statutory scheme under which we are granted exclusive jurisdiction to require a railroad to cease operations over one of its rail lines or to transfer the line to a new operator.").

[14] Petition to Reject or Revoke 5. Referring to Union Pacific Railroad.—Abandonment Exemption—in Lassen County, California & Washoe County, Nevada, AB 33 (Sub-No. 230X) (STB served Jan. 27, 2009), and the then-pending appeal before the Ninth Circuit, LVR specifically acknowledged, "that a portion of the Flanigan Industrial Lead remains subject to 49 U.S.C. § 10904 and [that LVR] will participate in the [OFA process] if Mr. Kemp ultimately is legally authorized to offer to purchase the 220-foot segment of the western end of the Flanigan Industrial Lead." LVR's Notice of exemption 2, Nov. 17, 2009.

[15] Petition to Reject or Revoke 5.

includes the entire rail line being acquired by NCR."[16] LVR filed its notice under 49 C.F.R. § 1150.33(e)(3) and (4), which requires an applicant to provide "[a] brief summary of the proposed transaction, including: . . . [t]he mile-posts of the subject property, and . . . [t]he total route miles, being acquired . . . ." LVR provided this information, and there is no evidence on the record that such information is not accurate. Moreover, to the extent Kemp is arguing here that the stated length of the line is false or misleading because it impermissibly includes the same stretch of line that Kemp is seeking to acquire in his Condemnation Action, that argument is baseless; as discussed above, Kemp cannot acquire the Line without Board approval and the Condemnation Action does not prevent LVR from seeking Board authority to acquire the Line.

In sum, Kemp has failed to show that LVR's notice of exemption in FD 35306 is improper in any way, that it contains false or misleading information warranting its rejection, or that revocation of the exemption is necessary to carry out the RTP.

Representations in FD 35307. Although not the subject of his petition to reject or revoke, Kemp takes issue with certain representations made in the related continuance in control notice of exemption filed by Schumacher in FD 35307. That notice of exemption stated that:

> Mr. Schumacher has many years of experience managing short line railroads [and] anticipates that, with the substantial resources at his disposal, he will be able to maintain, and where necessary, rehabilitate the lines of LVR, restore service on the lines, encourage shippers to locate their facilities along the lines, and create a financially viable railroad in the LVR.[17]

Kemp contends that Schumacher made these representations knowing that NCR was seeking to condemn and reconstruct the Susanville Industrial Lead, that only NCR has existing customers that can be served through the operation of the Line, and that LVR had not referred to any specific traffic to support its acquisition and operation of the Line.

We find nothing improper with Schumacher's representations. As noted earlier, even if LVR or Schumacher knew of Kemp's condemnation efforts, this would have little if any relevance to Kemp's petition to reject or revoke. There was nothing false or misleading, nor was there anything improper, in Schumacher's statement that LVR seeks to restore rail service on the Line and attract shippers. It is true that LVR did not refer to any potential traffic, but it was under no obligation to do so pursuant to the notice filing requirements at 49 C.F.R. § 1150.31 et al., which govern exemptions from line sales subject to 49 U.S.C. § 10901.[18]

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[16] Id.

[17] Schumacher's Notice of Exemption 3, Nov. 17, 2009.

[18] On the other hand, Kemp's OFA was filed under 49 U.S.C. § 10904, under which the Board may reject an OFA if the offeror fails to establish that it is genuinely interested in, or capable of, providing rail service or that there is a likelihood of future traffic. See Roaring Fork R.R. Holding Auth.—Aban. Exemption—in Garfield, Eagle & Pitkin Cntys., Colo., 4 S.T.B.

(continued . . .)

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Kemp's motions for leave to supplement the record and for an additional 5 days to do so are granted. Both Kemp's supplement and LVR's reply are accepted into the record.

2. Kemp's motion for oral argument is denied.

3. LVR's motion to reject Kemp's petition to reject or revoke is denied.

4. Kemp's petition to reject or revoke is denied.

5. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Nottingham.

(. . . continued)
116, 119-20 (1999); Burlington N. & Santa Fe Ry.—Aban. Exemption—in King Cnty., Wash., 3 S.T.B. 634, 638-39 (1998).